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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

RIN 0648-BE98

**Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands
Crab Rationalization Program**

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the North Pacific Fishery Management Council (Council) has submitted Amendment 44 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP) for review by the Secretary of Commerce (Secretary). Amendment 44 would modify required right of first refusal (ROFR) contract terms that provide eligible crab community entities with the opportunity to purchase certain processor quota shares and other associated assets when they are proposed for sale. Specifically, Amendment 44 would: extend the amount of time allowed for eligible crab community entities to exercise and perform under a ROFR contract; remove or modify provisions that currently allow a ROFR to lapse under specific conditions; provide flexibility for eligible crab community entities and processor quota shareholders to apply a ROFR to mutually-agreed upon assets; and add new reporting requirements for holders of processor

quota shares subject to a ROFR. Amendment 44 is necessary to enhance the ability of eligible crab communities to maintain their historical processing interests in the crab fisheries. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FMP, and other applicable laws.

DATES: Submit comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2013-0057, by any one of the following methods.

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0057, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of Amendment 44 to the FMP, the Regulatory Impact Review (RIR), the Initial Regulatory Flexibility Analysis (IRFA), and the Categorical Exclusion

prepared for this action may be obtained from <http://www.regulations.gov> or from the Alaska Region website at <http://alaskafisheries.noaa.gov>. The Environmental Impact Statement (EIS), RIR, and Social Impact Assessment prepared for the CR Program are available from the NMFS Alaska Region website at <http://alaskafisheries.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Rachel Baker, 907-586-7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment. This notice announces that proposed Amendment 44 to the FMP is available for public review and comment.

Background

NMFS manages the king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) under the FMP. The Council prepared the FMP under the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMP appear at 50 CFR part 680.

NMFS published the final rule to implement the Crab Rationalization (CR) Program on March 2, 2005 (70 FR 10174). Fishing under the CR Program started with the 2005/2006 crab fishing year.

The CR Program is a catch share program for nine BSAI crab fisheries that allocates those resources among harvesters, processors, and coastal communities. Under the CR Program, NMFS issued quota share (QS) to eligible harvesters based on their historical participation during a set of qualifying years in one or more of the nine CR Program fisheries.

QS is an exclusive, revocable privilege allowing the holder to harvest a specific percentage of the annual total allowable catch (TAC) in a CR Program fishery.

A QS holder's annual allocation, called individual fishing quota (IFQ), is expressed in pounds and is based on the amount of QS held in relation to the total QS pool for that fishery. NMFS issues IFQ in three classes: Class A IFQ, Class B IFQ, and Class C IFQ. Three percent of IFQ is issued as Class C IFQ for captains and crew. Of the remaining IFQ, 90 percent is issued as Class A IFQ and 10 percent is issued as Class B IFQ.

NMFS issued processor quota share (PQS) to qualified individuals and entities based on processing activities in CR Program fisheries during a period of qualifying years. PQS is an exclusive, revocable privilege to receive deliveries of a fixed percentage of the annual TAC from a CR Program fishery. A PQS holder's annual allocation is known as individual processing quota (IPQ). NMFS issues IPQ at a one-to-one correlation with the amount of Class A IFQ issued for each CR Program fishery. Class A IFQ must be delivered to a processor holding a matching amount of IPQ; Class C IFQ and Class B IFQ may be delivered to any registered crab receiver.

Right of First Refusal

The CR Program includes several provisions intended to protect specific communities that had historically been active in the processing of king and Tanner crab from adverse impacts that could result from the CR Program. The CR Program established eligibility criteria and regulations at § 680.2 identify the nine communities that satisfied the eligibility criteria: Adak, Akutan, Dutch Harbor, Kodiak, King Cove, False Pass, St. George, St. Paul, and Port Moller. These communities are referred to as "eligible crab communities" for purposes of the CR Program's community protection measures. Additional detail on the rationale and criteria used to establish the eligible crab communities can be found in the final

rule implementing the CR Program (March 2, 2005, 70 FR 10174). Additional information on these communities is provided in Section 3.1.4 of the RIR/IRFA prepared for this action.

With the exception of Adak, the CR Program provides eligible crab communities, or ECCs, with a right of first refusal (ROFR) on certain PQS and IPQ transfers. A ROFR provides an eligible crab community with the right to intervene in the sale (i.e., transfer) of PQS, IPQ, and “other goods” (i.e., assets) associated with that community under specific conditions. The regulations at § 680.41(l) require an eligible crab community to identify an entity to represent it for purposes of ROFR. The eight eligible crab communities that have a ROFR, and their representative entities are listed in Table 9 of the RIR/IRFA. The eligible crab community of Adak is not provided a ROFR for PQS or IPQ associated with that community because the CR Program incorporates other provisions to protect the community of Adak. These provisions are described in the final rule implementing the CR Program (March 2, 2005, 70 FR 10174).

Of the eight eligible crab communities, four are community development quota (CDQ) communities, and four are non-CDQ communities. In the case of eligible crab communities that are also CDQ communities, the local CDQ group is the entity that can exercise the ROFR on behalf of the community (see § 680.41(l)(2)(i)). For the other four non-CDQ eligible crab communities, regulations authorize the governing bodies of these eligible crab communities to identify the entity that can exercise the ROFR on behalf of the community (see § 680.41(l)(2)(ii)).

PQS and IPQ from the Bristol Bay red king crab, Bering Sea snow crab, Eastern Aleutian Islands golden king crab, St. Matthew Island blue king crab, and Pribilof red and blue king crab fisheries are subject to a ROFR. Section 3.1.3 of the RIR/IRFA describes the specific amounts of PQS and IPQ that were, and are, subject to a ROFR.

Under the ROFR, an eligible crab community entity is provided an opportunity to meet the same terms and conditions being offered to a proposed buyer of a proposed sale of PQS or IPQ. If an eligible crab community entity can meet the terms and conditions of a proposed sale, then the eligible crab community entity is transferred the PQS, IPQ, and any other goods instead of the proposed buyer. For a more detailed summary of ROFR, see section 3.1.3 of the RIR/IRFA.

The CR Program included a ROFR to provide eligible crab communities an opportunity to retain crab PQS, IPQ, and other goods before they are transferred to another buyer who could then choose to take that PQS, IPQ, and other goods out of the community. Such a transfer could adversely affect the economic stability of the community. The ROFR is intended to strike a balance between the interest of communities historically reliant on crab processing to retain that processing capacity within their communities, and the interest of PQS or IPQ holders to be able to engage in open market transfers of PQS, IPQ, and other goods.

ROFR Contract Terms

The ROFR is administered under the CR Program through contractual arrangements between eligible crab community entities and PQS/IPQ holders. Persons who hold PQS/IPQ that is subject to a ROFR must enter into a contract with the eligible crab community entity eligible to exercise a ROFR for those PQS/IPQ shares. The terms required in a ROFR contract between an eligible crab community entity and PQS/IPQ holder were established with implementation of the CR Program and are set forth in Chapter 11 of the FMP.

ROFR applies to any proposed sale of “PQS, and sales of IPQ, if more than 20 percent of the PQS holders’ community based IPQ in the fishery were processed outside of the community by another company (intra-company transfers within a region are excluded) in three of the preceding five years.” Intra-company transfers within a region are exempt from

(i.e., do not trigger) the ROFR, and sales of PQS for continued use within the community are exempt from ROFR.

The ROFR contract terms require that in order to complete a transfer under a ROFR, an eligible crab community entity must meet “the same terms and conditions of the underlying [proposed sale] agreement and will include all processing shares and other goods included in that agreement.” The ROFR contract terms also state that all terms of any ROFR—and contract entered into, related to ROFR—will be enforced through civil law. Additional details on the rationale for the civil enforcement of the terms in a ROFR contract are provided in the EIS, RIR, and Social Impact Assessment prepared for the CR Program, and the final rule implementing the CR Program (March 2, 2005, 70 FR 10174).

An eligible crab community entity must meet two important requirements to complete a ROFR and receive PQS, IPQ, or other goods associated with a proposed sale. The eligible crab community entity must: (1) exercise its ROFR, that is, provide a clear commitment to complete a purchase agreement within a specific time frame; and (2) perform under the ROFR, that is, meet all of the terms and conditions of the underlying agreement for the proposed sale within a specific time frame.

To exercise the ROFR, an eligible crab community entity must provide the seller of PQS or IPQ subject to a ROFR with notice of its intent to exercise the ROFR and earnest money in the amount of 10 percent of the contract amount or \$500,000, whichever is less, within 60 days of notice of a sale and receipt of the contract defining the sale’s terms. To perform the ROFR, the eligible crab community entity must meet the terms and conditions of the proposed sale (i.e., complete the sale) within 120 days, or within the time specified in the proposed sales contract, whichever is longer. If an eligible crab community entity does not exercise its ROFR, or it cannot perform under the ROFR contract, then the open market sale may proceed.

Revising ROFR Contract Terms

The CR Program, including the ROFR contract terms, was implemented under authority provided at section 313(j)(1) of the Magnuson-Stevens Act. Section 313(j)(3) states that after initial implementation of the CR Program, the Council may submit and the Secretary may implement changes to conservation and management measures for crab fisheries of the Bering Sea and Aleutian Islands to achieve on a continuing basis the purposes identified by the Council. This provision allows the Council to recommend, and NMFS to adopt, revisions to the required terms of a ROFR contract. For reasons provided below, the Council determined that the modifications to the ROFR contract terms that would be made by Amendment 44 would improve the achievement of the purposes of ROFR that were identified by the Council when it adopted the CR Program.

In developing the CR Program, the Council and NMFS recognized the unique historical relationship between eligible crab communities and processors associated with those communities, and established ROFR provisions to provide opportunities for eligible crab communities to be notified and intervene in sales of crab processing assets important to those communities. However, with experience gained from implementation, the Council has determined that some of the ROFR contract terms are limiting the effectiveness of the ROFR provisions.

Stakeholders, including representatives from the eight eligible crab community entities that can exercise a ROFR, noted concerns with several ROFR contract terms that could hinder an eligible crab community entity from effectively exercising and performing under a ROFR. Holders of PQS/IPQ subject to a ROFR concurred that several changes to the ROFR contract terms and notification requirements could improve the ability of eligible crab community entities to exercise and perform under a ROFR without unduly limiting open market transfers of PQS, IPQ, and other goods. The Council reviewed and analyzed these

concerns in a series of documents that have been consolidated under the RIR/IRFA prepared for Amendment 44 (see **ADDRESSES**). The Council recommended the provisions comprising Amendment 44 at its February 2013 and its October 2014 meetings.

Amendment 44

Amendment 44 is designed to address four categories of concern that stakeholders have for the existing ROFR contract terms. These are: (1) inadequate time for an eligible crab community entity to exercise and perform under a ROFR; (2) ROFR contract terms that allow a ROFR to lapse; (3) ROFR contract terms that do not allow an eligible crab community entity and a PQS/IPQ holder to mutually agree to the specific assets subject to a ROFR and to exclude “other goods” if desired; and (4) the lack of verification that proper notification and reporting of proposed sales between PQS/IPQ holders and eligible crab community entities has occurred.

To address these concerns, Amendment 44 would: (1) extend the amount of time allowed for eligible crab community entities to exercise and perform a ROFR contract, (2) remove or modify provisions that allow the ROFR to lapse under specific conditions, (3) provide flexibility for eligible crab community entities and PQS/IPQ holders to apply a ROFR only to mutually-agreed upon assets, and (4) add contract terms that require PQS holders to provide eligible crab community entities with information on pending transfers of PQS or IPQ and the use of IPQ. The following paragraphs provide additional detail on and rationale for these proposed modifications to required ROFR contract terms.

Extending Timelines to Exercise and Perform Under a ROFR Contract

Amendment 44 would modify the ROFR contract term specifying the amount of time to exercise and perform under a ROFR. Amendment 44 would increase the time allowed for an eligible crab community entity to exercise a ROFR from 60 days to 90 days from receipt of the sales contract. This modification would also increase the time allowed for an eligible

crab community entity to perform under the ROFR from 120 days to 150 days. The time period to exercise and the time period to perform under a ROFR begin on the date of receipt of the sales contract by the eligible crab community entity and run concurrently. The extension of both time periods is intended to help accommodate eligible crab community entities when deciding whether to exercise their ROFR, but also continue to recognize that time may be of the essence for a PQS holder or buyer under a contract.

The current ROFR contract term requires an eligible crab community entity to exercise the ROFR within 60 days from receipt of a contract defining a transfer from a PQS holder. Within that time period, the eligible crab community entity must inform the PQS holder that it is exercising its ROFR and provide earnest money equal to 10 percent of the transaction amount or \$500,000, whichever is less. The 60-day period is intended to provide community entities with the opportunity to assess the merits of intervening in the transaction. For some eligible crab community entities, such as community development quota (CDQ) groups, decisions of whether to enter simple, low value, transactions may be made expeditiously. However, an eligible crab community entity may require more time if the transaction is a larger, more complex transaction.

For each transaction, the eligible crab community entity must assess the value of the various items included in the transaction, as it may include more than just the PQS. Under the current provisions, other items included in the transaction would also be subject to the ROFR, which could substantially drive up the transaction costs. If a community is considering purchasing the PQS and the associated assets, it may need to assess the value of each of the items independently or as groups of items. In order to obtain an accurate valuation of the items, the community may need to consult experts or conduct its own appraisals. Once the valuation has occurred, an eligible crab community entity may need to obtain financing,

which could take a substantial amount of time beyond the 60 days that are currently afforded the eligible crab community entity.

By extending the timeline for exercising the ROFR from 60 days to 90 days, the eligible crab community entity that holds the ROFR would have more time to better evaluate a transaction, access earnest money, make preliminary financing arrangements, and make an appropriate decision concerning whether to exercise the ROFR. The extension would be particularly helpful in situations where public notice and meetings are required before deciding on how to proceed with the ROFR.

Removing or Modifying Provisions that Cause a ROFR to Lapse

Amendment 44 would amend the FMP to remove or modify contract terms that allow a ROFR to lapse. First, Amendment 44 would remove the ROFR contract term that allows a ROFR to lapse if the IPQ derived from the PQS subject to ROFR was processed outside the community of origin for a period of three consecutive years. Removal of this contract term would allow a ROFR to stay in place regardless of whether the IPQ is being used outside the community. However, if approved, Amendment 44 would not reinstate a ROFR that lapsed prior to implementation of Amendment 44. This change would strengthen the connection between PQS and the community that holds the ROFR for that PQS by maintaining the ROFR and elevating the interests of the eligible crab community entity that holds the ROFR over those of the community where the IPQ was being processed.

Amendment 44 also would remove the ROFR contract term that states that a ROFR will lapse if an eligible crab community entity fails to exercise its ROFR after it is triggered by a transfer of PQS and replace it with a ROFR contract term that would require the recipient of a PQS transfer (i.e., buyer) to enter into a new ROFR contract with an eligible crab community entity of the buyer's choosing in the designated region of the PQS. This amendment would ensure that an eligible crab community entity within the designated region

of the PQS retains a ROFR on that PQS even if the original eligible crab community entity chooses not to exercise a ROFR.

The modification would allow the new PQS holder to designate the original ROFR holder or a new eligible crab community entity within the PQS-designated region. This would only happen in the event that ROFR is triggered by the PQS transfer and the community that currently holds the ROFR chooses not to exercise its ROFR. Since use of the shares would be at the discretion of the PQS holder, both NMFS and the Council believe that the PQS holder should be best situated for identifying the community that would hold the ROFR.

This modification is intended to strengthen the ROFR program by maintaining a link between PQS and eligible crab communities in perpetuity. In addition, the proposed modification may provide the original eligible crab community entity that is not able to exercise a ROFR with another opportunity to use ROFR at some point in the future, should it be triggered again through a proposed sale of the PQS.

Flexibility to Apply a ROFR to Mutually-Agreed Upon Assets

One ROFR contract term currently requires that the ROFR apply to all terms and conditions of the underlying sale agreement, including all processing shares and other goods included in the agreement. Amendment 44 would revise this ROFR contract term to specify that, “Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in this agreement, or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity.” The proposed addition of the last clause in this sentence would allow a PQS holder and an eligible crab community entity to negotiate what assets may be subject to a ROFR. This would provide PQS holders and eligible crab community entities with more flexibility compared to the status quo. For example, it would allow an eligible crab community entity to

reach an agreement with the PQS holder that the ROFR would only apply to the PQS, and not to any other goods associated with a proposed sale.

The Council determined this flexibility was necessary to increase the opportunities for eligible crab communities to exercise and perform a ROFR. The current requirement for ROFR to apply to all terms and conditions of the underlying sale agreement may inhibit some eligible crab community entities from exercising and performing a ROFR because the terms of the underlying agreement may include a variety of assets, including processing equipment and real estate. Some of these assets may have no connection to the crab fisheries or the represented community. In these instances, a community entity may be unable to effectively use its ROFR if it cannot obtain financing or if the entity has no interest in acquiring the assets that are unrelated to the community it represents. The following example demonstrates the flexibility the proposed revision would create. A PQS holder has processing plants and equipment in communities A, B, and C, along with PQS currently used in community A. The entity representing community A holds a ROFR that is triggered if the PQS holder decides to transfer the PQS for use outside of community A. No processing currently takes place in communities B and C, but the PQS holder owns processing assets in those communities. If the PQS holder decides to sell the PQS that is used in community A and the assets it owns in communities A, B, and C, to a buyer who would use the PQS outside of community A, the proposed sale would trigger the ROFR. Under the current ROFR contract terms, to exercise its ROFR, the entity representing community A would be required to purchase the PQS and the processing assets in all three communities (A, B, and C), even though the eligible crab community entity may only be interested in purchasing the PQS and the processing assets in community A.

Under the flexibility provided by the revised contract term, the entity representing community A, which holds the ROFR, would have the option to reach an agreement with the

PQS holder that the ROFR only apply to the PQS and the processing assets in community A. The PQS holder would maintain the option to sell the assets in communities B and C without triggering community A's ROFR. The additional flexibility would benefit community entities because they would not be required to purchase assets that they might not have an interest in or be able to finance in order to maintain crab processing activities in their community, if the entity can reach an agreement with the PQS holder. Instead, communities would be able to purchase a previously agreed upon subset of the PQS holder's assets. The purchase price of the subset of assets may be less than the purchase price of all assets included in the underlying agreement. Therefore, community entities may be more likely to exercise ROFR if it only applies to those assets of interest to the community. For additional information on this proposed ROFR contract term, see section 3.2.6 of the RIR/IRFA.

Adding Requirements for PQS Holders to Report to Eligible Crab Community Entities

Amendment 44 would establish two new ROFR contract terms that require PQS holders to provide community entities holding ROFRs with information on transfers of IPQ or PQS and use of IPQ. These new ROFR contract terms would ensure that the eligible crab community entity has adequate information to track the use of IPQ and transfers of PQS, as needed, to protect the community's interests under the ROFR. Currently, eligible crab community entities have little information on the use of IPQ or transfers of PQS that are subject to the ROFR.

To address these issues, Amendment 44 would add a ROFR contract term that requires the PQS holder to notify the eligible crab community entity of any proposed transfer of IPQ or PQS, regardless of whether the PQS holder believes the transfer triggers the right. Second, Amendment 44 would add a ROFR contract term that requires the PQS holder to annually notify the eligible crab community entity of the location at which IPQ derived from PQS subject to a ROFR was used and whether the IPQ was used by the PQS holder. Both of

these proposed notifications would allow the eligible crab community entity to be more aware of what is occurring with the PQS for which they hold a ROFR.

The Council determined that while these notices would impose a small burden on the PQS holder, they would ensure that the eligible crab community entities and the communities they represent would have better information concerning the status of the ROFR. For additional detail on these notices, see section 3.2.5 of the RIR/IRFA.

In recommending Amendment 44, the Council largely intended to assist communities in maintaining historical processing interests in, and revenues from, the crab fisheries. These actions create community benefits that are expected to be relatively small but positive. The regional economic stability, equity, and community welfare benefits of these actions outweigh the possible production efficiency losses, transaction costs, and administrative expenditures arising from implementation of these actions.

Public comments are solicited on proposed Amendment 44 to the FMP through the end of the comment period (see **DATES**). NMFS intends to publish in the **Federal Register** and seek public comment on a proposed rule that would implement the accompanying regulations for Amendment 44, following NMFS' evaluation of the proposed rule under the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period on Amendment 44 to be considered in the approval/disapproval decision on Amendment 44. All comments received by the end of the comment period on Amendment 44, whether specifically directed to the FMP amendment or the proposed rule, will be considered in the FMP amendment approval/disapproval decision. Comments

received after that date will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the last day of the comment period.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 5, 2015

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